

August 5. 1766.

A N S W E R S

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William Black Messenger in Edinburgh;

T O T H E

PETITION and COMPLAINT of poor James
Selby late Vintner in the Abbey of Holyrood-house,
now in Jedburgh.

THE respondent was some time ago employed by the complainer to execute a horning at his instance against Lieutenant James Grierson of his Majesty's navy, who had retired to the sanctuary; which horning proceeded for the small debt mentioned in the complaint. The respondent did accordingly execute and denounce the horning; and a caption being thereafter raised, he did charge the Bailie of the Abbey thereon, in common form, to incarcerate the Lieutenant in his tolbooth of the Abbey, or other his warding places within the same.

The respondent has been informed, that Mr Wilson the Bailie presented a bill of suspension of this charge; and he also heard that that bill was refused; but whether this information he received was true or false, is exceedingly immaterial. Mr Wilson, however, granted a concurrence upon the

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decreet of the Sheriff of Edinburgh; which concurrence, if it had been intended to be effectual, ought to have been granted on the caption.

The complainer had, on different occasions, spoke to the respondent about executing his diligence after, as concurrence should be obtained. The respondent, however, who has not been very long in the practice of the office of a messenger, reckoned this a matter of unusual nicety, and distrusted his own skill; he therefore begged of the complainer to apply to some other messenger, who having had more practice in intricate cases of that kind, would better know how to conduct himself in an affair of delicacy.

Mr Selby, however, seems to have been inclinable to bring the respondent into a scrape; for, in place of applying to another messenger of more experience, which he ought to have done, after what the respondent had told him that very day that he obtained the concurrence of the Bailie, he got a party of three men, and with them went in quest of the respondent to execute his caption; they found the respondent, and he being informed that a concurrence had been obtained, did, without hesitation, go along with the party in order to have executed the diligence, which he thought himself bound in law to do, imagining that the concurrence was ingrossed on the back of the caption, and directed to messengers in the usual form; but at this time he did not look at the concurrence itself.

The complainer went with the respondent and his party to the room of Lieutenant Grierson, which was next door to his own house; the door of the room was opened by some of the party, and Mr Grierson being at home, the respondent called for the two constables, and the officer of the Abbey, and they having appeared, he desired them to apprehend the person of the said James Grierson, and carry him forth of the sanctuary, in order to his being imprisoned in the nearest sure prison, there being none within the precincts
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of the Abbey ; they however positively refused to carry Grierson any farther than the door of his own room ; upon which the respondent desired them to take him into their custody, and take charge of him ; which David Main constable, and Petrie officer, along with Mr Selby's party, accordingly did.

As this event of the constables and officer refusing to be assistant in the execution of the letters of caption, made the respondent consider a little more particularly what he was about ; he therefore immediately sent for a friend whom he considered to have more knowledge in such matters than he himself had ; his advice was, that, as there was no concurrence on the caption itself, and the execution of the concurrence that was granted, was not directed to messengers, but to the officers and constables within the precincts of the liberty of the Abbey, the respondent was not intitled to apprehend Grierson within the precincts of the Abbey, or carry him forth thereof ; and therefore, unless the constables and officers would go farther than they had yet been willing to do, the respondent should not meddle in the affair.

In the mean time, however, while the respondent was taking advice concerning this matter, the constable and officer to whose charge Mr Grierson had been committed, left the room, and two of the party who had been employed by Selby staid with Grierson. These two gentlemen thought proper to permit him to make his escape ; and the respondent apprehending, that he had no title to execute the caption in consequence of the advice that he had received, did not make farther search for him at that time.

The respondent after this was not desired to apprehend Grierson. A day or two thereafter Selby the complainer called at him, and demanded his papers, which were delivered to him ; this prevented the respondent from putting in execution a scheme he had projected, which was to apprehend Grierson when he should be without the precincts of the sanctuary ;

sanctuary; for he had received information, that he sometimes used a little freedom in this particular, and ventured to go privately without the limits.

On reconsidering the whole matter, the respondent apprehends, he has been guilty of no breach of duty in any thing he has done; for when particular circumstances are taken under view, perhaps no case could occur, where it was more difficult for a messenger to determine how he should behave.

Had the concurrence of the Bailie of the Abbey directed Mr Grierfon to be incarcerated within the prison of the Abbey, as is usual in such cases, there could have been little difficulty; the officer and constables of the Abbey could have put this diligence in execution, and Mr Grierfon would have been intitled to be liberated upon paying that small sum for which the caption was issued.

But when much more than this was to be done, when he was to be carried forth of the sanctuary altogether, and incarcerated in some jail, where he must lie at the mercy of all his creditors, and where he might be arrested for every shilling that he owed in the world, the case was very different. It was extremely probable, that a claim would be made for damages on account of wrongous imprisonment in carrying a person forth of the sanctuary, and incarcerating him in an ordinary jail; and it did occur to the respondent, that he ought by no means to be active in carrying him without the bounds of the sanctuary, tho', once he was without these bounds, he might apprehend him and commit him to jail; and as the Bailie of the Abbey, whose duty it was to take care that there should be a sufficient prison within the precincts, had ordered the debtor to be carried out of the precincts to another jail, the respondent did consider, that it was the duty of the Bailie and of his officers only to interfere, in so far as to carry Mr Grierfon forth of the sanctuary;

tuary; and that any ordinary officer of the law would be much to blame should he pretend to act in such a case.

Besides there seems to be very great doubts how far, by any concurrence of his, the bailie of the Abbay can deprive a debtor of the privilege of sanctuary altogether: So far he can go as to enforce payment of any debt contracted within the Abbay, by incarceration within his own jurisdiction; and in so far it may with justice be said, that the sanctuary affords no privileges against debts contracted within itself, since for these debts incarceration may proceed. But to say, that the bailie may order such a debtor to be carried forth of the sanctuary, and to be incarcerated in an ordinary jail, where he may be arrested by all his other creditors, is in other words to say, that it is *in arbitrio* of the bailie to deprive any man of the benefit of the sanctuary at his pleasure. The same powers that can entitle the bailie to order a debtor to be carried without the bounds of the sanctuary, in a case like this, will entitle him to do the same thing in many other cases: Hence the privileges of the sanctuary will be a matter of favour at the disposal of the bailie, and not a matter of right founded in the public law; the consequences are too strong for the premisses to be admitted. The respondent did apprehend, that the concurrence of the bailie, in so far as it ordered the debtor to be carried out of the bounds of the sanctuary, was illegal; and therefore he did not chuse to be active in the execution of it himself, tho' he was ready, if the proper executorial officers of the bailie's warrants had executed this concurrence, so far to have done his part as to have put the debtor in prison once he was forth of the sanctuary. He knew that not only those who grant, but those who execute an illegal warrant, are censurable; and therefore he chose not in this case to interfere, in so far as the warrant appeared illegal, especially as the warrant did not seem to be directed to him in those particulars wherein he thought it illegal, but to other persons; and consequent-

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ly it was their duty and not his to execute it, even supposing it lawful.

It was these considerations, and these only, that made the respondent stop short where he did: Indeed the circumstances of the case are such as will not admit of any other interpretation. The whole amount of the debt, even according to the shewing of the complainer himself, was under six guineas, including expences and every thing: The whole of such a debt was not a sufficient bait to tempt a messenger to malverſe in the execution of his office; and as Mr Grierſon was confined to the precincts of the ſanctuary, where he muſt every day appear and be found, it cannot be ſuppoſed that he would beſtow any conſiderable ſum to procure an eſcape that could be attended with little or no benefit to him; as he muſt, of neceſſity, be in the way of being apprehended every day afterwards. The circumſtances of the caſe, therefore, will not permit of the ſuppoſition, that there was any pecuniary corruption in the caſe; and it is not ſo much as inſinuated, that there was any other connection between Grierſon and the respondent, as to bias the latter to commit a breach of duty: It was a doubt in point of law, and a doubt which the respondent apprehends will appear to your Lordſhips well founded, which made him delicate in a caſe where the perſonal liberty of a fellow-ſubject was ſo directly concerned.

In reſpect whereof, &c.

ANDREW CROSBIE.